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In the

Supreme Court of the United States

No. 71-1434

HARVEST BRAND, INC., (Now by Substitution HARVEST INDUSTRIES, INC.),

Petitioner,

vs.

A. E. STALEY MANUFACTURING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Tenth Circuit

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This patent infringement action does not give rise to the Question Presented by the Petition. In reversing the District Court, the Court of Appeals did not, "abruptly" or otherwise, reverse findings of fact, the charge (Pet. p. 2) on which the Question of the Petition is based. Nor, did the Court of Appeals disregard the findings, "cavalierly" or otherwise, as asserted (Pet. p. 7) in connection with the Reasons For Granting The Writ.

Rather, reversal was required because, as stated in the opinion of the Court of Appeals (A-27):

> "***the District Court erred in its conclusion that the Staley patent lacked novelty and non-obviousness."

These legal errors are totally ignored by the Petition. Instead the Petition advances, as Reasons For Granting The Writ, two propositions which have no substance.

The first is that the 1968 appellate rules impose limitations on length of briefs and oral arguments which compel an appellee to choose "between, on the one hand, supporting the findings of fact of the trial court, and, on the other hand demonstrating the error in the multitude of statements in the appellant's brief" (Pet. p. 6).

Not so. What confronted Petitioner in the Court of Appeals was the impossible task, as later shown, of defending findings of fact which were irrelevant to the issues because they were based on misconceptions of the law and which were contrary to uncontroverted evidence which compelled conclusions opposite to those arrived at by the District Court.

Moreover, Petitioner was not deprived of the opportunity by the appellate rules or otherwise of demonstrating, if it could, what it considered to be "errors in the multitude of facts" in Respondent's briefs to the Court of Appeals. Much of Petitioner's brief to that Court was directed to factual matters. Moreover, Petitioner devoted 7 pages of its Petition For Rehearing to the Court of Appeals to factual assertions under the heading "The 'Facts' Relied Upon By This Court's Opinion Are In Error And Untrue" (A-38 to A-44) and, pursuant to leave granted by that Court (A-33), filed a 13 page "Supplemental List of Erroneous Statements in Plaintiff's Briefs" (A-46 ot A-58) challenging as untrue, and worse,

56 statements contained in Respondent's brief. The Court of Appeals which was "persuaded, on the entire evidence, that a mistake has been committed" (A-27), denied the petition. Petitioner had more than its day in Court. Considered in the best possible light, Petitioner's argument in this regard is simply that had it known at the time its brief was written what the decision of the Court was going to be, it would have moved the Court for leave to file a longer brief—as the rules of procedure permit.

The second or "corollary" reason advanced by the Petition is an alleged need for instruction from this Court to lower courts that an admission of novelty is not an admission of patentability (Pet. pp. 11-12). The Petition does not assert that either of the lower courts in this case require such instruction and for good reason. The trial court ignored Petitioner's admission that Respondent's patent was novel and held to the contrary because of a misconception of the law governing that issue. While the Court of Appeals agreed with Petitioner on the novelty of Respondent's patent, it did so not on the basis of the admission—which is not mentioned—but because "The great weight of the evidence does not support the (District) Court's conclusion on the issue of novelty." (A-21)

The conclusions of the District Court on the novelty and non-obviousness issues were founded on basically one error of law. In the view of the District Court, it is the elements of a combination patent considered separately rather than the combination as a whole which is to be judged for novelty and for obviousness. This approach clearly appears from the findings of the trial court that each of the separate elements or ingredients of the patented blocks were separately old in the prior art, and from the absence of any findings directed to the whole of such combination.

The absence of relevant findings by the District Court to the novelty issue as correctly defined by the law was twice noted by the Court of Appeals—"The lower court made no findings of fact which would negate the claim of novelty" (A-20), and "There were no findings of fact concerning anticipation or aggregation ***". (A-21).

The Petition itself establishes the error of the District Court and the correctness of the holding of the Court of Appeals on the novelty issue. Petitioner states (Pet. p. 11) that it "forthrightly asserted to the courts below" that there were differences between the subject matter of Respondent's patent claims and the prior art. The Court of Appeals so held, noting that "The great weight of the evidence does not support the Court's conclusion on the issue of novelty" (A-21).

The District Court's error of law on the novelty issue necessarily led it into further error on the issue of obviousness. Having erroneously concluded that the prior art disclosed the subject matter of the claims of Respondent's patent, the District Court found no "differences between the prior art and the claims at issue." Accordingly, the differences which in fact exist, and which are conceded by Petitioner to exist, between the prior art and the subject matter of Respondent's claims were never judged for non-obviousness as commanded by *Graham* v. *Deere*, 1966, 383 U. S. 1.

For the same reason, the District Court ignored the evidence, most of it uncontroverted, which establishes:

> That at the time the invention of Respondent's patent was made, men skilled in the art and employed at competing companies in the industry had repeatedly tried but were unable to achieve the objects of the invention;

That the prior products and methods, when used in commerce, had proven to be inoperable to achieve the objects of the invention and, indeed, had deterred investigation of utilizing essential elements of Respondent's patent to solve the problems; and,

That, the combination of elements of the claims of Respondent's patent achieve new and surprising results.

Respondent's patented combination includes high levels of salt and high levels of molasses formed into a block. For example, the patent discloses a combination of 70% dehydrated molasses, 20% salt, 2% animal fat and trace minerals, and an additional 8% molasses in its wet form to act as a binder for the other ingredients. This combination formed a weather-resistant block which not only can be self-fed on the open range, but which results in a high degree of consumption control, making it useful as a carrier for medicaments (drugs) required to be taken by the animals at a steady, regulated dosage.

This combination is undeniably new: The basic concept of combining substantial amounts of molasses (highly palatable and weather unstable) with substantial amounts of salt (highly palatable and weather unstable) in a livestock feed is antithetical to the prior art. It is not shown anywhere.

The results achieved by this combination are also new. Livestock are attracted to, and regularly eat from, the block. At the same time, the combination of ingredients in the block somehow limits the day-to-day consumption by the animal to a limited amount. For these reasons, the rate of consumption is remarkably regular from day to day, and from animal to animal. The dual result—attraction to insure some consumption each day by each

animal, yet uniform regulation of the amount consumed—enables the rancher to self-feed the block to provide each animal in the herd with its daily supply of molasses. Prescribed dosages of vitamins and medicaments incorporated in the patented block are regularly consumed, eliminating the expensive and tedious job of animal-by-animal hand feeding or dosing every day by the farmer or the rancher.

The value of molasses in the feeding of animals is well known. Carbohydrates in the form of sugars in molasses are utilized as sources of energy by animals. Cattle derive an even more important benefit from molasses. They, along with other ruminants such as sheep and goats, have specialized digestive systems which contain a vast population of bacteria and protozoa which produce enzymes, enabling the animal to digest roughage. Roughage, because of its high fiber content, is otherwise indigestible or, at best, very difficult to digest. In general terms, molasses provides the bacteria with energy, and they in turn produce the enzymes necessary to enable cattle to utilize roughage as their principal feed ingredient. With over half the land in the continental United States producing only roughage, its proper utilization is vital.

Molasses is beneficial only if not over-consumed. It has a laxative effect, causing "scours" or diarrhea in the animals. Also, when in excess, the acids produced tend to suppress the bacteria population and thereby interfere with roughage digestion. Thus, maximum nutritional benefit from roughage is obtained only by feeding molasses in controlled amounts.

The opinion of the Court of Appeals reflects uncontroverted evidence in its statement that the product of Respondent's patent (A-20):

". . . is a highly palatable feed block for cattle or sheep from which they will eat a surprisingly consistent amount each day. Two novel benefits are derived from this regulated consumption. First, although molasses is very beneficial to cattle, too large an intake can cause scouring or diarrhea. This problem has been eliminated in the Staley patent block. Second, because cattle like the taste of molasses, unpalatable medicines can be added to the Staley block and cattle will consume them in a controlled amount. The Staley patent feed block thus accomplishes two new and novel results."

Included in such evidence is that which establishes the patented feed block as the sole known effective medium for the self-administration to livestock of the "bloat" preventive medicament, poloxalene. Bloat result when fermentation gasses build up and are trapped in the rumen of the animal. The resulting pressure on the lungs can cause suffocation and death to the animal. The cost of losses due to bloat was over 100 million dollars annually. To be effective in preventing bloat, poloxalene must be administered at a prescribed rate during *every* twelve hour period to *each* animal. The patented blocks, with their regular and uniform consumption, have proven to be the only practical way to have cattle take their own medicine in a regulated way without individual dose-by-dose administration.

Similarly, with respect to the self-administration to livestock of phenothiazine, a worming agent and preventative of horn flies and face flies: though it is highly distasteful, it too must be consumed in regulated doses, and on a regular basis, to be effective. Flies and worms also result in heavy animal livestock losses. Even though phenothiazine had been known as a fly control agent for over 25

years, "there wasn't a practical way to feed it" until the advent of the patented block (R. 188).*

A further error of the District Court was its failure to make findings on or give heed to the evidence showing the failures and inabilities of the prior art to meet the objectives and accomplish the results of Respondent's patented product. See *United States* v. *Adams*, 1966, 383 U. S. 39 at 50-51. Such deficiencies in the trial court's findings were noted by the Court of Appeals as follows (A-22):

> "... The Court did not, however, make any findings dictated by the great weight of the evidence in the record reflecting the failures and drawbacks of the prior art in accomplishing the novel result achieved through the Staley patent. Each of the prior arts above referred to were wrought with practical limitations * * *"

Also ignored by the District Court was the evidence establishing that the inoperative prior art relied upon by Petitioner actually deterred investigation of the direction taken by the patentees of Respondent's patent. The Court of appeals (A-25) agreed with this Court on the signifi-

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* In a rather transparent effort to impart an emotional appeal to its assertions, Petitioner suggests (Pet. pp. 2, 10) that the price of meat will be inflated due to the patent. Not only is this suggestion wholly unwarranted on the record of this litigation, it directly contradicts undisputed evidence that the patented blocks result in greater utilization of range and pasture land, promote an annual savings of millions of dollars a year from livestock which would otherwise be lost through bloat or fly/worm infestation, and generally permit an increased efficiency in livestock operations with an attendant savings in cost and rise in production.

cance of such evidence. See *United States* v. *Adams*, supra at 51-52.*

The Petition makes no attempt to defend the errors and omissions of the District Court which are pointed out in the opinion of the Court of Appeals. Rather, Petitioner seeks to obscure such errors behind a plea of inviolability of fact findings; notwithstanding that in the instant case such findings were immaterial to the issues involved and the direct result of the errors of law committed in the District Court.

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* One highly-qualified nutritionist associated with a competing block maker conceded that his company had—for over a year after the patented blocks came on the market—failed to offer the high level salt-molasses combination because only 1% salt was the general recommendation of "textbooks on nutrition and feeding" (R. 502). Petitioner's expert would not have thought to incorporate high levels of salt in a block which was to include molasses because "almost invariably it would reduce the weatherability." (R. 345).

Since this case does not present the Question advanced by the Petition and the Reasons asserted for granting the Writ are devoid of merit, the Petition should be denied.

Respectfully submitted,

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